

FILED IN THE  
U.S. DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

MAR 22 2004

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UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF WASHINGTON

IN RE:

DENNIS STEFFLER,

Debtor.

NO. CY-02-3076-EFS

CENEX SUPPLY AND MARKETING,  
an operating division of  
Cenex Harvest States  
Cooperatives, a Minnesota  
cooperative association,  
Plaintiffs,

v.

U.S. BANK N.A.; DENNIS K.  
STEFFLER and DIANE J.  
STEFFLER, husband and wife,  
and TRAVIS STEFFLER and MARY  
STEFFLER, husband and wife,

Defendants.

**ORDER AFFIRMING IN PART AND  
REVERSING IN PART THE  
BANKRUPTCY COURT'S ORDER,  
REMANDING, AND CLOSING FILE**

U.S. Bank appeals from the Bankruptcy Court's Findings of Facts and Conclusions of Law. (Ct. Rec. 2.) The underlying action was brought by Cenex to retrieve crop proceed checks received by U.S. Bank. The Bankruptcy Court held that Cenex was entitled to recover the Stefflers' 1998 crop proceeds since Cenex had a senior crop lien and perfected security interest. After review of the memoranda and certificate of

1 record and consideration of the arguments of the parties, the Court  
2 hereby **AFFIRMS IN PART AND REVERSES IN PART** the Order of the Bankruptcy  
3 Court.

#### 4 **I. JURISDICTION AND STANDARD OF REVIEW**

5 This Court has jurisdiction to hear this appeal from a final order  
6 of the bankruptcy court pursuant to 28 U.S.C. § 158. The bankruptcy  
7 court's conclusions of law are subject to *de novo* review, while its  
8 findings of fact are reviewed under the clearly erroneous standard. Fed.  
9 R. Bankr. P. 8013; *In re Eastman*, 188 B.R. 621, 624 (B.A.P. 9th Cir.  
10 1995). A finding of fact is clearly erroneous when the reviewing court,  
11 after consideration of the entire record, is left with the firm  
12 conviction that a mistake has been made. *United States v. Gypsum Co.*,  
13 333 U.S. 364, 395 (1948). The burden of establishing that a finding of  
14 fact is clearly erroneous is upon the appellant. *In re Drehsen*, 190 B.R.  
15 441, 442 (M.D. Fla. 1995). *De novo* review applies to a grant of summary  
16 judgment, and the evidence must be analyzed in a light most favorable to  
17 the party against whom judgment was entered. *In re De Laurentiis Entm't*  
18 *Group, Inc.*, 963 F.2d 1269, 1271-72 (9th Cir. 1992).

#### 19 **II. FACTS AND PROCEDURAL HISTORY**

20 This is a complicated bankruptcy matter involving both secured  
21 interests and negotiable instruments. The Bankruptcy Court did an  
22 excellent job of developing the record. On appeal, much of the evidence  
23 is uncontroverted; parties stipulated to many of the facts in the  
24 Pretrial Order and U.S. Bank only challenges three of the Bankruptcy  
25 Court's Findings of Fact. Accordingly, the following are uncontroverted  
26 facts.

1 Debtors, Dennis K. Steffler and Diana Steffler, were residents of  
2 Grant County, Washington. The Stefflers farmed row crops and obtained  
3 financing for the farming operation from U.S. Bank since at least 1993.  
4 In 1997, U.S. Bank provided the farming business with an operating loan.  
5 U.S. Bank knew the farming operation suffered large losses in 1997 and  
6 that the 1997 operating loan could not be repaid when it came due in  
7 March of 1998; when the 1997 operating loan came due it had an unpaid  
8 balance of more than \$1,480,000. U.S. Bank also knew that Mr. Steffler  
9 had taken money from the 1997 operating loan for the purpose of making  
10 an unauthorized purchase of a new home.

11 From March 1998 through July 1998, U.S. Bank had a number of  
12 discussions with Mr. Steffler about the financing for the farming  
13 operation. During this time, U.S. Bank was aware that Cenex, a  
14 cooperative association which sells fertilizer and crop protection  
15 products, was selling such "crop inputs" to the Stefflers. In fact,  
16 Cenex had filed a crop lien on April 24, 1998, against the 1998 crops  
17 listed thereon and their proceeds, U.C.C.-4 Lien Statement, file no. 98-  
18 114-0155. On July 20, 1998, Mr. Steffler signed a security agreement in  
19 favor of Cenex, and Cenex filed a U.C.C.-1 Financing Statement listing  
20 Mr. Steffler as Debtor on July 23, 1998, file No. 98-204-0379.

21 Although U.S. Bank had concerns about the losses suffered by the  
22 farming operation in 1997, as well as the Stefflers' inability to pay the  
23 1997 operation loan when it came due in March of 1998, it continued to  
24 advance money to the Stefflers from March 1998 through July 1998 totaling  
25 more than \$938,000. In addition, even though U.S. Bank's financing  
26 statement had been filed before Cenex filed its crop lien, U.S. Bank did

1 not document or keep track of its 1998 advances to Mr. Steffler in such  
2 a way as to enable it to trace its advances to 1998 crop inputs.

3 From May 1998 through July 1998, U.S. Bank and Cenex had a number  
4 of discussions concerning Steffler's 1998 farm operations. U.S. Bank  
5 learned that the farming operation had a carryover debt from 1996 and  
6 1997 with Cenex in the approximate sum of one million dollars. During  
7 these discussions, U.S. Bank provided Cenex with a portion of the farming  
8 operation's budget identifying 1998 revenue projections; however, U.S.  
9 Bank did not provide Cenex with that portion of the budget identifying  
10 1998 expenses. The 1998 budget, prepared by U.S. Bank, identified  
11 \$420,000 of short-term debt as revenue but did not include any payment  
12 of that debt in the projected expenses. The Bank also prepared a  
13 financial statement for the farming operation which intentionally omitted  
14 carryover debt owed by the Stefflers to Cenex of more than one million  
15 dollars.

16 U.S. Bank made three loans to the Stefflers on July 30, 1998: (1)  
17 a \$170,000 loan that was payable in full on or before October 26, 1998,  
18 (2) a \$250,000 loan that was payable in full on or before December 15,  
19 1998, and (3) a 1998 operating line of credit in the maximum sum of  
20 \$2,500,000 that was payable in full on or before December 15, 1998. On  
21 July 30, 1998, U.S. Bank realized that the farm operation's budget did  
22 not support payment of the 1998 loans when they were scheduled to become  
23 due and payable, and knew that Cenex had provided the farm operation with  
24 almost all of the inputs needed to grow the 1998 crops. These loan  
25 documents and a letter sent to the Stefflers, dated July 28, 1998,  
26 require that requests for advances exceeding \$20,000 be submitted in

1 writing together with supporting invoices; this requirement was not  
2 enforced by U.S. Bank. Accordingly, the advances from this operating  
3 line to purchase inputs used to produce 1998 crops were not traceable to  
4 specific crop inputs. However, the bank was familiar with the amount of  
5 money the farming operation needed in order to pay for 1998 crop inputs  
6 and knew that the 1998 farming expenses, exclusive of harvest costs, were  
7 incurred before July 30, 1998.

8 In July of 1998, U.S. Bank and Cenex reached an agreement. As part  
9 of this agreement, Cenex would not immediately attempt to collect payment  
10 of its carryover debt from the Stefflers and Cenex would indorse checks  
11 representing 1998 crop proceeds so that those checks could be deposited  
12 in the Stefflers' checking account.

13 The Stefflers did not pay the \$170,000 when it came due on October  
14 26, 1998. Cenex was not informed of this default by either U.S. Bank or  
15 the Stefflers. On this same date, U.S. Bank knew that the Stefflers  
16 would be unable to pay the 1998 loans when the same were scheduled to  
17 come due. On December 15, 1998, the Stefflers did not pay the \$250,000  
18 loan or the 1998 operating loan; again, neither U.S. Bank nor the  
19 Stefflers informed Cenex of the default on these loans.

20 An employee of a Seattle branch of U.S. Bank inadvertently filed a  
21 termination statement of its perfection of the security interest in the  
22 farming operation's collateral on October 16, 1998.<sup>1</sup> After the  
23

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24 <sup>1</sup> Mr. Steffler was previously married to the late Kathy Steffler.  
25 In 1993, Mr. Steffler and Kathy Steffler borrowed money from U.S. Bank  
26 for the farming operation; U.S. Bank perfected its security interest by

1 termination statement, U.S. Bank continued to claim a perfected security  
2 interest in the 1998 crops in correspondence mailed to Cenex on December  
3 22, 1998, and in telephonic communications between Cenex and U.S. Bank  
4 during February of 1999. In correspondence to the Stefflers dated  
5 January 15, 1999, U.S. Bank acknowledged the potential for a dispute with  
6 Cenex regarding competing claims to the 1998 crop proceeds.

7 Mr. Steffler received checks representing proceeds of 1998 crops.  
8 The following checks included the Steffler(s) and U.S. Bank as payees,  
9 were deposited in the Stefflers' personal checking account at U.S. Bank,  
10 and in turn Mr. Steffler made a check payable to U.S. Bank on the  
11 Stefflers' personal check: (1) Check No. 124615, dated 10/10/98,  
12 \$26,034.83, issued by Basic American/Sunspiced, and (2) Check No. 021080,  
13 dated 11/13/98, \$93,439.02, issued by Washington Potato.<sup>2</sup>

14 \_\_\_\_\_  
15 filing a U.C.C.-1 financing statement on March 8, 1993, with Washington  
16 State, file No. 93-067-0949. After Kathy's death, Mr. Steffler  
17 remarried, and on March 21, 1997, Mr. Steffler and Diana Steffler entered  
18 into an Agricultural Security Agreement with U.S. Bank. In connection  
19 with this agreement, an Amendment to the prior U.C.C.-1 financing  
20 statement changed debtor number two from Kathy Steffler to Diana  
21 Steffler. This document was filed on March 31, 1997, file No. 97-090-  
22 0507. As a result of this amendment, U.S. Bank mistakenly filed a  
23 U.C.C.-3 Change Statement with the termination box checked, which stated:  
24 "Secured Party(ies) no longer claim a security interest under the  
25 financing statement bearing file number shown in box 5."

26 <sup>2</sup> U.S. Bank contends that these two checks should not be part of

1       The following checks named Cenex, U.S. Bank, and the Steffler(s) as  
2 payees, were deposited into the Stefflers' personal checking account, and  
3 in turn Mr. Steffler made a check payable to U.S. Bank on the Stefflers'  
4 personal checks: (1) Check No. 195360, dated 10/23/98, \$54,346.87, issued  
5 by Cenex Supply & Marketing, (2) Check No. 02031, dated 11/17/98,  
6 \$91,417.25, issued by Basic American/Sunspiced, (3) Check No. 1922261,  
7 dated 11/20/98, \$25,493.54, issued by Cenex Harvest States, (4) Check No.  
8 2610, dated 12/05/98, \$336,401.06, issued by Columbia River Sugar Co.,  
9 and (5) Check No. 2611, dated 12/05/98, \$50,695.65, issued by Columbia  
10 River Sugar.

11       The following checks included Cenex, U.S. Bank, and the Steffler(s)  
12 as payees, and were delivered directly to U.S. Bank, without running  
13 through the Stefflers' personal account: (1) Check No. 7944, dated  
14 12/29/98, \$88,903, issued by Maizena, Inc., (2) Check No. 02362, dated  
15 01/14/99, \$26,034.83, issued by Basic American/Sunspiced, and (3) Check  
16 No. 002541, dated 02/12/99, \$94,999.66, issued by Basic  
17 American/Sunspiced.

18       In February of 1999, U.S. Bank informed Cenex that it would no  
19 longer continue to provide financing for the farming operation and that  
20 it would not release 1998 crop proceeds or advance money from the  
21 operation loan in order for the Stefflers to pay Cenex for its 1998 crop  
22 inputs. Also, in February of 1999, U.S. Bank continued to represent that

23 \_\_\_\_\_  
24 the present lawsuit between itself and Cenex, and were inappropriately  
25 allowed in by the Bankruptcy Judge by granting Cenex's motion to amend  
26 pleadings.

1 its financing statement was senior and superior to the Cenex crop lien  
2 and financing statement.

3 In late February 1999, Cenex obtained a lien search and discovered  
4 the existence of U.S. Bank's termination statement. On March 5, 1999,  
5 Cenex informed U.S. Bank of the results of the lien search and demanded  
6 payment of all 1998 crop proceeds. Following this demand, the following  
7 1998 check proceed checks were indorsed by Mr. Steffler and U.S. Bank and  
8 were delivered directly to Cenex: (1) Check No. 22253, dated 03/31/99,  
9 \$46,719.51, issued by Washington Potato a/k/a Oregon Potato, and (2)  
10 Check No. 195901, dated 05/05/99, \$90,356.37, issued by Cenex Harvest  
11 States. The following check was tendered to the court, pursuant to the  
12 parties' agreement: Check No. 8147, dated 05/28/99, \$88,902.90, issued  
13 by Maizena, Inc.

14 Based on the above thirteen checks, U.S. Bank received 1998 crop  
15 proceeds totaling \$887,765.71 and Cenex received 1998 crop proceeds  
16 totaling \$137,075.88.

### 17 **III. ISSUES ON APPEAL**

18 On appeal, U.S. Bank argues the following findings of fact are  
19 clearly erroneous:

- 20 1. The Bankruptcy Court's finding that U.S. Bank knew on July 30,  
21 1998, that Steffler had not paid for his 1998 crop inputs to  
22 Cenex. (Finding of Fact 24.)
- 23 2. The Bankruptcy Court's finding that Mr. Steffler's crop  
24 proceeds were going to be a source of repayment for Cenex.  
25 (Finding of Fact 25.)
- 26 3. The Bankruptcy Court's finding that U.S. Bank and Cenex did not



1 make any agreement regarding the priority of payment from  
2 Steffler's 1998 crop proceeds. (Finding of Fact 26; related  
3 to Conclusion of Law 10.)

4 U.S. Bank presents the following legal issues:

- 5 1. Whether U.S. Bank is entitled to retain the funds representing  
6 the crop proceeds checks as it is a holder in due course.  
7 (Conclusion of Law 7.)
- 8 2. Whether U.S. Bank is entitled to retain the 1998 crop proceeds  
9 because Cenex waived its rights in the crop proceeds checks.  
10 (Conclusion of Law 9.)
- 11 3. Whether U.S. Bank is entitled to retain the proceeds from  
12 certain crop proceeds checks having received them in the  
13 ordinary course of business. (Conclusion of Law 8.)
- 14 4. Whether Cenex did not agree to subordinate its crop lien in  
15 favor of U.S. Bank. (Conclusion of Law 10; connected to Finding  
16 of Fact 26.)
- 17 5. Whether U.S. Bank is entitled to the 1998 crop proceeds to the  
18 extent they represent repayment of the bank's 1998 inputs.  
19 (Conclusion of Law 4.)
- 20 6. Whether Bankruptcy Court erred in allowing Cenex to amend its  
21 Complaint to include two additional claims for conversion  
22 regarding checks numbered 124615 and 021080 and whether those  
23 claims should have been allowed to relate back to avoid the bar  
24 of the statute of limitations. (Conclusions of Law 15 & 16.)
- 25 7. Whether the Bankruptcy Court erred by concluding that U.S. Bank  
26 breached a contract with Cenex when that was never a claim

asserted by Cenex. (Conclusion of Law 5.)

8. Whether U.S. Bank is entitled to an equitable reinstatement of its security interest. (Conclusion of Law 11.)

9. Whether the Bankruptcy Court committed reversible error by incorporating sua sponte its oral ruling into the written Findings of Fact and Conclusions of Law over the objection of U.S. Bank.

#### IV. DISCUSSION

### A. Findings of Fact

### 1. Finding of Fact No. 24

The Bankruptcy Court found:

When Bank made its loans to Steffler on July 30, 1998, Bank knew that Steffler had not paid Cenex for 1998 crop inputs by virtue of the Cenex crop lien filed on April 24, 1998, and by virtue of communications with Cenex occurring before July 30, 1998.

(Finding of Fact No. 24.) U.S. Bank contends this finding is clearly erroneous since the mere filing of a crop lien does not create knowledge that the 1998 Cenex crop inputs have not been paid and there is no evidence that U.S. Bank knew that Steffler owed Cenex for its 1998 inputs on or before July 30, 1998, especially since the crop lien states that payment is due on "12-31-98." U.S. Bank points to the testimony claiming that Mr. Steffler told U.S. Bank that Cenex was paid current on the 1998 inputs, the Stefflers' draws matched the budgeted expenditures for crop inputs, and no one from Cenex informed U.S. Bank that Mr. Steffler owed Cenex over a half-million dollars for 1998 inputs.

Cenex argues that the evidence confirms that at the time the Bank made its loans to the Stefflers on July 30, 1998, the Bank knew that the

1 Stefflers were not paying Cenex for 1998 inputs. Cenex points to the  
2 testimony of Mr. Davies, the Cenex manager, who stated that when he met  
3 with U.S. Bank loan officers, Mr. Weimer and Mr. Merrell, in May of 1998  
4 he informed them that Cenex had not received any payment for 1998 inputs.  
5 Cenex argues that Mr. Davies' testimony was supported by Mr. Weimer and  
6 Mr. Merrell's testimony. In addition, Cenex points to the existence of  
7 the Cenex crop lien highlighting that the Bankruptcy Court remarked that  
8 it would be inconsistent for Cenex to file a crop lien in April of 1998  
9 and then fail to mention concerns about payment of Steffler's 1998  
10 account in subsequent conversations with U.S. Bank.

11 U.S. Bank replies that the testimony may reflect that sometime in  
12 May Cenex told U.S. Bank that Cenex had unpaid inputs but no testimony  
13 reflects that U.S. Bank knew two months later that Cenex's 1998 inputs  
14 continued to be unpaid. U.S. Bank highlights that on June 2, 1998, Mr.  
15 Steffler took a \$75,000 advance and signed a financial statement showing  
16 no debt to Cenex and he told U.S. Bank that the 1998 Cenex inputs had  
17 been paid current. The evidence shows that Mr. Steffler withdrew  
18 \$493,000 between mid-March of 1998 and mid-June of 1998. U.S. Bank  
19 contends that it is reasonable to assume he used this to pay Cenex for  
20 the inputs incurred in 1998 since the farm budget allocated approximately  
21 \$683,000 for seed, fertilizer and chemicals.

22 The Court concludes that the Bankruptcy Court's decision was not  
23 clearly erroneous. U.S. Bank had no reason to believe the Stefflers paid  
24 off the Cenex 1998 crop inputs as compared to the 1996/1997 carryover  
25 debt. U.S. Bank representatives testified that Mr. Steffler advised him  
26 that he was paid current. However, this Court defers to the Bankruptcy

1 Court's credibility determinations. Although this Court may reach a  
2 different determination, it cannot say that the Bankruptcy Court's  
3 finding that on July 30, 1998, U.S. Bank knew the Stefflers had not paid  
4 Cenex for its 1998 inputs was clearly erroneous.

5 **2. Finding of Fact No. 25:**

6 The Bankruptcy Court entered the following factual finding:

7 In July of 1998 Bank and Cenex reached an agreement that (1)  
8 Cenex would not immediately attempt to collect payment of its  
9 carryover debt from Steffler; (2) Cenex would be paid for 1998  
10 inputs with money from 1998 crop proceeds and from Steffler's  
1998 operation loan; and, (3) Cenex would endorse checks  
representing 1998 crop proceeds so that those checks could be  
deposited in Steffler's checking account.

11 (Finding of Fact 25 (emphasis added).) U.S. Bank contends that the  
12 Bankruptcy Court's finding that the Stefflers' crop proceeds were going  
13 to be a source of repayment for Cenex was clearly erroneous. U.S. Bank  
14 argues that if Cenex actually believed that it was to be repaid out of  
15 the Stefflers' 1998 crop proceeds, then Cenex would have retained the  
16 crop proceeds checks. Further, U.S. Bank argues that by indorsing the  
17 1998 crop proceed checks and tendering them without a restrictive  
18 indorsement, to Mr. Steffler, Cenex evidenced that it knew it was not  
19 entitled to those checks. Cenex argues Mr. Davies' testimony supports  
20 the Bankruptcy Court's finding.

21 After reviewing the entire record, the Court finds the Bankruptcy  
22 Court's finding clearly erroneous. The testimony shows that U.S. Bank  
23 and Cenex representatives understood that Cenex would be paid from the  
24 operating line of credit. The operating line of credit would be "funded"  
25 with the 1998 crop proceed checks. The testimony shows that Cenex  
26 understood that the Stefflers would either write Cenex a check on their

1 personal account or ask U.S. Bank for an advancement on the operating  
2 loan. After the 1998 crop proceeds were received, Mr. Steffler deposited  
3 the indorsed checks into his personal account. Mr. Steffler chose not  
4 to provide funds to Cenex. After reviewing the record, the Court is  
5 firmly convinced that the factual finding that "Cenex would be paid for  
6 1998 inputs with money from 1998 crop proceeds" is clearly erroneous and  
7 therefore as to Finding of Fact 25 the Court finds: Cenex would be paid  
8 for 1998 inputs with money from Stefflers' 1998 operating loan.

9 **3. Finding of Fact No. 26**

10 Finding of Fact No. 26 entered by the Bankruptcy Court was, "Bank  
11 and Cenex did not make any agreement regarding the priority of payment  
12 from Steffler's 1998 crop proceeds." U.S. Bank argues that the  
13 Bankruptcy Court erred in finding that U.S. Bank and Cenex did not make  
14 any agreement regarding the priority of payment from the Stefflers' 1998  
15 crop proceeds and its conclusion that Cenex did not agree to subordinate  
16 its crop lien in favor of U.S. Bank. Cenex responds that the record  
17 confirms that priority of the interests was not an element of the  
18 agreement which the parties negotiated in May or June of 1998 as is  
19 evidenced by Mr. Weimer's and Mr. Merrell's testimony.

20 R.C.W. § 62A.9-316 supports U.S. Bank's proposition that the U.C.C.  
21 anticipates and accommodates subordination agreements.<sup>3</sup> See also  
22 *Williams v. First Nat'l Bank & Trust*, 482 P.2d 595, 597 (Okla. 1971); *In*  
23 *re Mihalko*, 87 B.R. 357, 365 (E.D. Pa. 1988). R.C.W. § 62A.1-201(3)  
24 defines "agreement" as "the bargain of the parties in fact as found in

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25  
26 <sup>3</sup> R.C.W. § 62A.9-316 provides, "This Article does not preclude  
subordination by agreement by a person entitled to priority."

1 their language or by implication from other circumstances including  
2 course of dealing or usage of trade or course of performance . . . ."

3 The Court agrees with the Bankruptcy Judge's factual finding that  
4 the parties' agreement did not include subordination of Cenex's security  
5 interest or crop lien to U.S. Bank's security interest. During the  
6 parties' negotiations, the parties understood that U.S. Bank had the  
7 prior security interest. Accordingly, there was no reason for Cenex to  
8 subordinate its security interest or crop lien because they were already  
9 junior to U.S. Bank's interest. Accordingly, the Court agrees with the  
10 Bankruptcy Court's finding.

#### 11 **B. Conclusions of Law<sup>4</sup>**

##### 12 **1. Conclusion of Law No. 7**

13 The Bankruptcy Court held the "Bank cannot make any claim to crop  
14 proceeds as a holder in due course," (Conclusion of Law No. 7). In  
15 response to Cenex's conversion action, U.S. Bank contends that is

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17 <sup>4</sup> U.S. Bank did not challenge the following legal conclusions of  
18 the Bankruptcy Court:

- 19 (1) The Bank's perfected security interest in Stefflers' 1998 crops  
20 and 1998 crop proceeds became unperfected when U.S. Bank filed  
21 its termination statement on October 16, 1998.
- 22 (2) When U.S. Bank refiled its financing statement on March 22,  
23 1999, its then perfected security interest in Stefflers' 1998  
24 crop and 1998 crop proceeds was junior and inferior to  
25 competing claims created by the Cenex crop lien and the Cenex  
26 financing statement.

1 entitled to retain the funds representing the crop proceeds checks  
2 because it is a holder in due course ("HIDC"), by definition or by virtue  
3 of a transfer of HIDC status from Cenex.

4 A secured party may bring a conversion action to recover proceeds  
5 wrongfully paid to a third party. *J.I. Case Credit Corp. v. First Nat'l*  
6 *Bank*, 991 F.2d 1272 (7th Cir. 1993). The general rule is a person taking  
7 an instrument, is subject to a claim of a property or possessory right  
8 in the instrument or its proceeds, including a claim to rescind a  
9 negotiation and to recover the instrument or its proceeds. R.C.W. §  
10 62A.3-306. However, a person having rights of an HIDC takes free of the  
11 claim to the instrument.<sup>5</sup> *Id.*; *Wesche v. Martin*, 64 Wash. App. 1, 8  
12 (1992). Whether a party is an HIDC is a factual question. *Merrick v.*  
13 *Peterson*, 25 Wash. App. 248 (1980).

14 **(a) Payee**

15 Cenex's main argument is that a payee, which U.S. Bank was, cannot  
16 be an HIDC, citing to Comment 4 to R.C.W. 62A.3-302 and Comment 2 to  
17 R.C.W. § 62A.3-305. Comment 2 to R.C.W. § 62A.3-305 provides,

18 In most cases the holder in due course will be an immediate or  
19 remote transferee of the payee of the instrument. In most  
20 cases the holder in due course doctrine is irrelevant if  
21 defenses are being asserted against the payee of the  
22 instrument, but in a small number of those cases the payee of  
23 the instrument may be a holder in due course.

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24 <sup>5</sup> Article 9 provides, "[n]othing in this Article limits the rights  
25 of a holder in due course of a negotiable instrument . . . [these]  
26 holders . . . take priority over an earlier security interest, even  
perfected, to the extent provided in Articles 3 . . . . R.C.W. § 62A.9-  
309.

1 The Bank understands the interaction of 3-302(2) and 3-305 as follows:  
2 payees may be holders in due course, but like any other holder in due  
3 course, the respective rights are still subject to the defenses of § 3-  
4 305. The Court agrees with U.S. Bank's analysis. U.S. Bank is a payee,  
5 who can also be an HIDC. U.S. Bank did not deal directly with the maker  
6 of the instruments. It was named as a payee simply because it had a  
7 security interest in the 1998 crop proceeds. Accordingly, the Court  
8 finds that this case is one of "a small number of those cases [where] the  
9 payee of an instrument may be a holder in due course." See R.C.W. §  
10 62A.3-305 Cmt. 2.

11 **(b) By Definition**

12 Section 62A.3-302(a) sets out the requirements for an HIDC:

- 13 (1) The instrument when issued or negotiated to the holder  
14 does not bear such apparent evidence of forgery or  
15 alteration or is not otherwise so irregular or incomplete  
16 as to call into question its authenticity; and  
17 (2) The holder took the instrument (i) for value, (ii) in  
18 good faith, (iii) without notice that the instrument is  
19 overdue or has been dishonored or that there is an  
20 uncured default with respect to payment of another  
instrument issued as part of the same series, (iv)  
without notice that the instrument contains an  
unauthorized signature or has been altered, (v) without  
notice of any claim to the instrument described in R.C.W.  
62A.3-306, and (vi) without notice that any part has a  
defense or claim in recoupment described in R.C.W. §  
62A.3-305(a).

21 R.C.W. § 62A.3-302(a); *Cent. Wash. Bank v. Mendelson-Zeller*, 113 Wash.  
22 2d 346, 353 (1989). There appears to be no dispute that the checks were  
23 authentic and complete, U.S. Bank is a holder, U.S. Bank took the checks  
24 for value, the instrument was not overdue or dishonored, and the  
25 signatures were authorized. The only requirements that are challenged  
26 are whether U.S. Bank took the checks in good faith and without notice



1 of any claims against them.

2 U.S. Bank contends that it acted in good faith since it acquired the  
3 checks in an ordinary deposit transaction. Cenex argues that U.S. Bank  
4 did not take in good faith because U.S. Bank knew that the Stefflers were  
5 in trouble on the bank loans.

6 Good faith is defined as "honesty in fact in the conduct or  
7 transaction concerned." R.C.W. § 62A.1-201(19). The good faith test is  
8 a subjective test; there is no reasonable care standard included in the  
9 good faith requirement. *Merrick v. Peterson*, 25 Ash. App. 248 (1980);  
10 *Von Gohren v. Pac. Nat. Bank of Wash.*, 8 Wash. App. 245 (1973).

11 Cenex cites to *Financial Management Services, Inc. v. Familian*  
12 *Corp.*, 905 P.2d 506, 512 (Ariz. App. Div. 1 1995). In *Familian Corp.*,  
13 a senior secured creditor sued a junior secured creditor to recover  
14 proceeds collected by the junior creditor from a common debtor's accounts  
15 receivable. The court held that the junior creditor took the proceeds  
16 clear of the senior creditor's security interest because the junior  
17 creditor was an HIDC of the joint checks issued by customers of the  
18 debtor. In so holding, the court reasoned that the junior creditor acted  
19 in good faith, even though it knew of the senior interest, because it did  
20 not know that receiving such payments violated the financing arrangement  
21 between the debtor and senior secured creditor. The court noted that the  
22 filing of a financing statement does not charge the junior creditor with  
23 knowledge that it or the debtor acted wrongfully by performing their  
24 joint check agreement. Yet, "[h]ad [the junior creditor] believed that  
25 [the debtor] was on the verge of bankruptcy or unable to pay [the senior  
26 creditor], [the junior creditor's] actions may have constituted bad

1 faith. The record is clear, however that [the junior creditor] believed  
2 that [the debtor's] business was strong and that [the junior creditor]  
3 knew that [the debtor] had made a large payment to [the senior  
4 creditor]." See also *N. Cent. Kan. Prod. Credit Assn. v. Boese*, 19 UCC  
5 Rep. Serv. 179, 185 (D. Kansas 1976) (finding junior creditor acted in  
6 good faith and observed reasonable commercial practice even though it did  
7 not conduct a search for security interests).

8 The Court agrees with the rule that knowledge that a senior party  
9 filed a financing statement or lien is insufficient by itself to defeat  
10 good faith. However, even though the Court concludes that U.S. Bank did  
11 not have notice of a claim on the instrument, the Court determines that  
12 U.S. Bank did not act in good faith since it knew the Stefflers had been  
13 unable to pay the 1997 operating loan when it came due and also that the  
14 Stefflers defaulted on the loan due on October 26, 1998, and then later  
15 the loans due in December 1998. Accordingly, U.S. Bank had reason to  
16 believe that the Stefflers' financial condition was precarious.

17 **(c) Transfer of HIDC status**

18 In the alternative, U.S. Bank suggests that it is a holder in due  
19 course by virtue of a transfer of HIDC status from Cenex via the eight  
20 checks indorsed by Cenex and then deposited into Stefflers' personal  
21 account. An instrument is transferred when it is "delivered by a person  
22 other than its issuer for the purpose of giving to the person receiving  
23 delivery the right to enforce the instrument." R.C.W. § 62A.3-203(a).

24 A transfer,

25 vests in the transferee any right of the transferor to enforce  
26 the instrument, including any rights as a holder in due course,  
but the transferee cannot acquire rights of a holder in due  
course by a transfer, directly or indirectly from a holder in

1 due course if the transferee engaged in fraud or illegality  
2 affecting the instrument.

3 *Id.* § 62A.3-203(b).

4 The Court concludes U.S. Bank cannot obtain holder in due course by  
5 virtue of a transfer of HIDC status because the Court finds that Cenex  
6 was not an HIDC. Cenex could not take in good faith because it too knew  
7 that Stefflers' farming operation was not financially successful. The  
8 farming operation still owed Cenex for 1996-97 crop inputs. Under the  
9 agreement, Cenex did believe that it would be paid for the 1998 crop  
10 inputs through the operating loan. However, the 1996-97 crop inputs were  
11 still unpaid.

12 For the above reasons, the Court finds that U.S. Bank is not an HIDC  
13 of the 1998 crop proceed checks either by definition or by virtue of a  
14 transfer of HIDC status.

## 15 **2. Conclusion of Law No. 9**

16 The Bankruptcy Court concluded:

17 Since Cenex endorsed checks representing payment of crop  
18 proceeds pursuant to its understanding with Bank, its  
19 endorsement of those checks did not constitute any waiver of  
20 its right to payment from the crop proceeds.

21 (Conclusion of Law No. 9). U.S. Bank contends that is entitled to retain  
22 the 1998 crop proceeds because Cenex waived its rights in eight of the  
23 crop proceeds checks<sup>6</sup> by indorsing each of the checks in question and

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24 <sup>6</sup> The eight checks at issue are: (1) Check No. 195360, dated  
25 10/23/98, \$54,346.87, issued by Cenex Supply & Marketing, (2) Check No.  
26 02031, dated 11/17/98, \$91,417.25, issued by Basic American/Sunspiced,  
(3) Check No. 1922261, dated 11/20/98, \$25,493.54, issued by Cenex  
Harvest States, (4) Check No. 2610, dated 12/05/98, \$336,401.06, issued

1 tendering them to Mr. Steffler, without a restrictive indorsement as  
2 provided under R.C.W. § 62A.3-206(c). Cenex responds the Bankruptcy  
3 Court's conclusion of law is supported by the Bankruptcy Court's Finding  
4 of Fact No. 25 finding that U.S. Bank and Cenex agreed that Cenex would  
5 be paid for 1998 inputs with money from 1998 crop proceeds and from the  
6 Stefflers' 1998 operating loan. Further, Cenex argues that it was simply  
7 performing its agreement with U.S. Bank to indorse checks and that Cenex  
8 would be paid for 1998 inputs from crop proceeds as well as from money  
9 in Stefflers' operating loan.

10 "[W]aiver is the intentional and voluntary relinquishment of a known  
11 right, or such conduct as warrants an inference of the relinquishment of  
12 such right." *Estate of Lindsay v. Lindsay*, 91 Wash. App. 944, 950 (1998)  
13 (citation omitted)). The knowledge of the right can be either actual or  
14 constructive. *Constantino v. Mareschi*, 9 Wash. 2d 638, 652-53 (1941).  
15 Waiver occurs when the party voluntarily acts, implying a choice, to  
16 dispense of a right or forego an advantage. *Estate of Lindsay*, 91 Wash.  
17 App. at 951.

18 In *Anon, Inc. v. Farmers Production Credit Association of*  
19 *Scottsburg*, 35 U.C.C. Rep. Serv. 1383, 1388 (Ind. App. 1983), the Indiana  
20 state court determined that a secured creditor waived its security  
21 

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by Columbia River Sugar Co., (5) Check No. 2611, dated 12/05/98,  
22 \$50,695.65, issued by Columbia River Sugar, (6) Check No. 7944, dated  
23 12/29/98, \$88,903, issued by Maizena, Inc., (7) Check No. 02362, dated  
24 01/14/99, \$26,034.83, issued by Basic American/Sunspiced, and (8) Check  
25 No. 002541, dated 02/12/99, \$94,999.66, issued by Basic  
26 American/Sunspiced.

1 interest in hogs when it allowed the debtor to sell the hogs upon  
2 condition that debtor promptly remit proceeds of sale to secured  
3 creditor, in contradiction to the contract requirement that debtor obtain  
4 prior written consent for such sales from secured creditor.

5 The Court finds the Indiana state court's analysis helpful in  
6 analyzing whether a secured party takes an intentional act that is  
7 inconsistent with a right, thereby waiving that right. Here, the  
8 Bankruptcy Court appeared to charge U.S. Bank with the knowledge that it  
9 terminated its perfected security interest on October 16, 1998, but the  
10 Bankruptcy Court apparently did not charge Cenex with the knowledge that  
11 it possessed a senior security interest. Under Article 9, the Court  
12 finds that both U.S. Bank and Cenex are to be charged with the knowledge  
13 of U.S. Bank's termination statement, and corresponding effect.  
14 Therefore, Cenex is imputed with knowing that U.S. Bank did not have a  
15 perfected security interest; rather, Cenex had priority to the 1998 crop  
16 proceeds. R.C.W. § 62A-9-312. By intentionally indorsing the checks,  
17 and then providing the indorsed checks to Mr. Steffler or U.S. Bank,  
18 Cenex waived its ability to assert its senior interest. Accordingly,  
19 U.S. Bank did not convert these eight checks from Cenex.

20 The Court acknowledges that the indorsement of the checks was part  
21 of the parties' agreement; however, the Bankruptcy Court determined that  
22 this agreement did not affect the parties' priority, a finding which  
23 Cenex did not appeal. Yet, the filing of the termination agreement did  
24 alter the parties' priorities. Both parties are charged with the  
25 knowledge of this change in status. Accordingly, when Cenex indorsed  
26 these checks they engaged in an intentional act which was directly

1 adverse to its senior security interest. Cenex contends that the  
2 parties' agreed that Cenex would be paid from either the crop proceed  
3 checks directly or the operating loan, and therefore, allowing these  
4 checks to be paid to U.S. Bank first was not in contravention to its  
5 senior interest. However, the Court concludes otherwise. The Court  
6 finds Cenex's indorsement and then transfer to either Mr. Steffler or  
7 U.S. Bank to be an intentional relinquishment of their senior security  
8 interest. Therefore, U.S. Bank is entitled to these eight crop proceed  
9 checks.

### 10 3. Conclusion of Law No. 8

11 The Bankruptcy Court entered the following legal conclusion: "Bank  
12 cannot make any claim to crop proceeds as payment received in the  
13 ordinary course of business." (Conclusion of Law No. 8.)

14 U.S. Bank argues that it is entitled to retain the proceeds from  
15 seven crop proceeds checks<sup>7</sup> since it received them in the ordinary course  
16

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17 <sup>7</sup> The following checks at issue are those that were deposited in  
18 the Stefflers' personal checking account at U.S. Bank, and in turn Mr.  
19 Steffler made a check payable to U.S. Bank on the Stefflers' personal  
20 checking account: (1) Check No. 124615, dated 10/10/98, \$26,034.83,  
21 issued by Basic American/Sunspiced, (2) Check No. 021080, dated 11/13/98,  
22 \$93,439.02, issued by Washington Potato, (3) Check No. 195360, dated  
23 10/23/98, \$54,346.87, issued by Cenex Supply & Marketing, (4) Check No.  
24 02031, dated 11/17/98, \$91,417.25, issued by Basic American/Sunspiced,  
25 (5) Check No. 1922261, dated 11/20/98, \$25,493.54, issued by Cenex  
26 Harvest States, (6) Check No. 2610, dated 12/05/98, \$336,401.06, issued  
ORDER ~ 22

1 of business pointing to the "otherwise provided language" in R.C.W.  
2 62A.9-306. Cenex argues that these payments were not in the ordinary  
3 course since U.S. Bank knew or was reckless about knowing whether the  
4 payment violated Cenex's security interest.

5 Section 62A.9-306 provided that a properly perfected security  
6 interest extends to the identifiable cash proceeds of a sale of  
7 collateral subject to that security interest. Also, the holder of the  
8 security interest is entitled to recover cash proceeds from unauthorized  
9 subsequent transferees. Yet, Official Comment 2(c) to § 62A.9-306  
10 provided:

11 Where cash proceeds are covered into the debtor's checking  
12 account and paid out in the operation of the debtor's business,  
13 recipients of the funds of course take free of any claim which  
14 the secured party may have had in them as proceeds. What has  
15 been said relates to payments and transfers in ordinary course.  
The law of fraudulent conveyances would no doubt in appropriate  
cases support recovery of proceeds by a secured party from a  
transferee out of ordinary course or otherwise in collusion  
with the debtor to defraud the secured party.

16 R.C.W. § 62A.9-306 Cmt. 2(c) (emphasis added). The dictionary defines  
17 "collusion" as "an agreement to defraud another or obtain something  
18 forbidden by law." Black's Law Dict. (7th Ed. 1999).

19 The Court finds helpful the Seventh Circuit's discussion and  
20 analysis in *J.I. Case Credit Corp. v. First National Bank*, 991 F.2d 1272  
21 (7th Cir. 1993), of previous cases, including *Linn Co-op Oil Co. v.*  
22 *Norwest Bank Marion*, 444 N.W.2d 497 (Iowa 1989), and *Harley-Davidson*  
23 *Motor Co. v. Bank of New England-Old Colony, N.A.*, 897 F.2d 611 (1st Cir.  
24 1990). The Court agrees with the Seventh Circuit's ruling that "a

25 \_\_\_\_\_  
26 by Columbia River Sugar Co., and (7) Check No. 2611, dated 12/05/98,  
\$50,695.65, issued by Columbia River Sugar.

1 payment is within the ordinary course if it was made in the operation of  
2 the debtor's business and if the payee did not know and was not reckless  
3 about whether the payment violated a third party's security interest."  
4 See *ITT Commercial Fin. Corp. v. Bank of the West*, 166 F.3d 295, 305 (5th  
5 Cir. 1999) (adopting the Seventh Circuit's rule). The Seventh Circuit  
6 noted that "[a] person can know that a security interest exists but not  
7 know that a payment is being made in violation of that interest." *Id.* at  
8 1278.

9 The Fourth Circuit follows this same rule, stating in *Orix Credit*  
10 *Alliance, Inc. v. Soveran Bank N.A.*, 4 F.3d 1262 (4th Cir. 1993), "a  
11 transferee's knowledge of a prior security interest in proceeds does not,  
12 by itself, indicate that the transfer of these proceeds occurred outside  
13 the ordinary course of the debtor's business." Rather, the court is to  
14 analyze the particular arrangement or course of dealing between the  
15 parties to determine whether the receipt of proceeds was consistent with  
16 such and in the ordinary course. *Id.*

17 Cenex is correct that neither Washington courts nor the Ninth  
18 Circuit have yet adopted Comment 2(c) as legal precedent. Yet, the Court  
19 concludes the Washington legislature's intent can be inferred from the  
20 2001 revisions to Article 9. R.C.W. 62A.9A-332 now provides:

21 **Transfer of money; transfer of funds from deposit account. (a)**  
22 **Transferor of money.** A transferee of money takes the money  
23 free of a security interest unless the transferee acts in  
24 collusion with the debtor in violating the rights of the  
25 secured party. **(b) Transferee of funds from deposit account.**  
26 A transferee takes the funds free of a security interest in the  
deposit account unless the transferee acts in collusion with  
the debtor in violating the rights of the secured party.

These revisions changed primarily the general layout of Article 9, and  
the U.C.C. Comments provide "the Comments to former Article 9 will remain



1 of substantial historical value and interest. They also remain useful in  
2 understanding the background and general conceptual approach of this  
3 Article." U.C.C. Cmt 1. (Source). Accordingly, the Court adopts the  
4 rule that one who takes a check in the ordinary course of business takes  
5 fee of a security interest if the payee did not know and was not reckless  
6 about whether the payment violated a third party's security interest.

7 Here, U.S. Bank and the Stefflers had a business relationship since  
8 1993. The Stefflers had a personal checking account and an operating  
9 line of credit with U.S. Bank during this period. Per the advise of his  
10 accountant, Mr. Steffler would deposit a crop proceeds check into his  
11 personal account. To pay off his operating line of credit, he would then  
12 write a check on his personal checking account to U.S. Bank. The process  
13 of depositing the crop proceeds to the Stefflers' account and then  
14 writing a check from the account to U.S. Bank to apply against the  
15 Stefflers' loans with U.S. Bank was the routine manner in which financing  
16 and repayment between the Stefflers and U.S. Bank had been handled for at  
17 least five years prior the 1998 crop year. Accordingly, when Mr.  
18 Steffler deposited the seven 1998 crop proceed checks into his personal  
19 account in the fall/winter of 1998 and then wrote a check to U.S. Bank  
20 towards his operating line of credit, this was done in the ordinary  
21 course of the debtor's business. U.S. Bank officials took no unusual  
22 steps to exact early payment or otherwise enforce U.S. Bank's security  
23 interest. Further, there is no evidence that U.S. Bank and Mr. Steffler  
24 colluded. When these seven checks were received, neither U.S. Bank  
25 representatives nor Mr. Steffler were actually aware of the termination  
26 agreement. Accordingly, they could not, and did not, reach an

1 "agreement" to defraud Cenex. For the above reasons, U.S. Bank is  
2 entitled to the seven 1998 crop proceed checks which were received in the  
3 ordinary course of business.<sup>8</sup>

#### 4 **4. Conclusion of Law No. 10**

5 The Bankruptcy Court determined: "Cenex did not make any agreement  
6 to subordinate its crop lien and its perfected security interest in favor  
7 of Bank." (Conclusion of Law No. 10.) As discussed above in connection  
8 with Finding of Fact 26, the Court agrees with this determination.

#### 9 **5. Conclusion of Law No. 6**

10 The Bankruptcy Court entered the following conclusion:

11 The Cenex crop lien filed on April 24, 1998, and the Cenex  
12 financing statement filed on July 23, 1998, created valid and  
13 enforceable rights in and to the 1998 crop proceeds that were  
14 senior and superior to any competing claims by Bank.

15 (Conclusion of Law No. 6.) U.S. Bank contends it is entitled to the 1998  
16 crop proceeds to the extent they represent repayment of the bank's 1998  
17 inputs. Cenex argues U.S. Bank no longer had a perfected security  
18 interest in the Stefflers' 1998 crops as a result of the termination  
19 statement. Further, Cenex argues that there is a distinction between a  
20 security interest in proceeds and a security interest in instruments, and  
21 U.S. Bank cannot trace the proceeds. R.C.W. § 62A.9-312(2).

22 The general rule is "conflicting liens and security interests [of  
23 crops and their proceeds] shall rank in accordance with the time of  
24 filing." R.C.W. § 60.11.050(1). However, "liens and security interests

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25 <sup>8</sup> The Court notes it previously concluded that U.S. Bank was  
26 entitled to five of these 1998 crop proceed checks because Cenex waived  
its senior interest.

1 which are incurred to produce the crop take priority over liens and  
2 security interests which were not incurred to produce the crop." *Food*  
3 *Servs. of Am. v. Royal Heights*, 123 Wash. 2d 779, 793 (1994); R.C.W. §  
4 60.11.050(3).

5 The Court determines that after October 16, 1998, Cenex had the  
6 senior security interest. U.S. Bank may have perfected its security  
7 interest in the crop proceeds upon possessing the checks; however, this  
8 perfected security interest was junior to Cenex's security interest.  
9 Accordingly, Cenex has priority for the 1998 crop proceeds received.  
10 However, the Court concludes that U.S. Bank has priority, due to its  
11 financing statement filed in 1999 for the 1998 crop proceeds, over  
12 Cenex's claims payment for 1996/1997 crop inputs.

#### 13 **6. Amendment of the Complaint**

14 U.S. Bank argues the Bankruptcy Court erred in allowing Cenex to  
15 amend its Complaint to include two additional claims for conversion  
16 regarding checks numbered 124615 and 021080. If this amendment was in  
17 error, U.S. Bank states that these two claims would be barred by the  
18 statute of limitations since Cenex failed to foreclose on its crop lien  
19 within the statutory period. R.C.W. § 60.11.130; *Pearle v. Greenlee*, 76  
20 Wash. App. 338, 340 (1994). Cenex argues the Bankruptcy Court properly  
21 allowed Cenex to amend its complaint under Federal Rule of Evidence 15(a)  
22 so as to confirm that it was requesting foreclosure of a crop lien as  
23 well as foreclosure of its perfected security interest.

24 The Court finds that the Bankruptcy Court did not error in granting  
25 Cenex leave to amend, thereby adding or clarifying that the two checks  
26 are part of the dispute. The Bankruptcy Court adequately balanced the

1 factors involved and gave U.S. Bank sufficient time to show prejudice.

2       **7. Conclusion of Law No. 5**

3       The Bankruptcy Court concluded:

4       Bank breached its promise and agreement with Cenex that Cenex  
5       would be paid for 1998 inputs with money from 1998 crop  
6       proceeds and from Steffler's 1998 operating loan.

6 (Conclusion of Law 5.)

7       U.S. Bank argues this conclusion was reached in error because a  
8       breach of contract claim was never asserted by Cenex. Further, U.S. Bank  
9       points out that there is no evidence in the record that U.S. Bank  
10      promised to pay Cenex, but rather, Mr. Davis' testimony shows that he  
11      expected payments to come from Mr. Steffler. Cenex contends that the  
12      Bankruptcy Court properly determined that a contract existed between U.S.  
13      Bank and Cenex after reviewing the arguments and testimony presented by  
14      Cenex.

15      After review of the findings of fact, the Court finds the Bankruptcy  
16      Judge's conclusion was in error. Even if such a claim was raised by  
17      Cenex, the parties' agreement did not guarantee that U.S. Bank would pay  
18      Cenex. There was no testimony presented that Cenex expected to be paid  
19      in a manner differently than it had in the past, i.e. Mr. Steffler would  
20      pay Cenex. There was no testimony that U.S. Bank would directly pay  
21      Cenex. The evidence showed the parties understood that Mr. Steffler had  
22      a line of credit at U.S. Bank and that he could use this line of credit  
23      to seek advancements to pay Cenex. Mr. Steffler chose not to; U.S. Bank  
24      cannot be said to be in breach of an agreement due to Mr. Steffler's  
25      decision. Accordingly, Conclusion of Law No. 5 is clearly erroneous.

26      ///

1       **8. Conclusion of Law No. 11**

2       After review of the evidence, the Bankruptcy Court concluded,  
3       Bank is not entitled to equitable reinstatement of the  
4       financing statement that was terminated when it erroneously  
5       filed its termination statement on October 16, 1998.  
6       (Conclusion of Law No. 11.) U.S. Bank argues that it is entitled to an  
7       equitable reinstatement of its security interest and that the mistaken  
8       filing of the termination statement should not result in a windfall to  
9       Cenex. Cenex argues that U.S. Bank is not entitled to equitable relief  
10      since it inadvertently filed a termination statement.

11      The Court agrees with the Bankruptcy Court's conclusion. The case  
12      law is clear that if a third-party's, i.e. Cenex's, rights are affected  
13      by the termination agreement that equitable reinstatement of the  
14      perfected security interest is inappropriate. *U.S. Bank v. Oliverio*, 109  
15      Wash. App. 68 (2001); *In re Burkard*, 6 UCC Rep. Serv. 244 (Bankr. S.D.  
16      Ohio 1969).

17       **9. Incorporation of Findings and Conclusions**

18      The Court determines that the Bankruptcy Court did not err by  
19      incorporating the oral factual findings and conclusions into the written  
20      Findings of Fact and Conclusions of Law.

21                   **V. CONCLUSION**

22      After reviewing the record, arguments, and relevant statutes and  
23      case law, the Court determines Cenex and U.S. Bank are entitled to the  
24      1998 crop proceed checks as follows:

25       **(1) Cenex:**

- 26           (a) Check No. 22253, dated 03/31/99, \$46,719.51, issued by  
            Washington Potato a/k/a Oregon Potato

(b) Check No. 195901, dated 05/05/99, \$90,356.37, issued by  
Cenex Harvest States

(c) Check No. 8147, dated 05/28/99, \$88,902.90, issued by  
Maizena, Inc.

**(2) U.S. Bank:**

(a) Check No. 124615, dated 10/10/98, \$26,034.83, issued by  
Basic American/Sunspiced (ordinary course of business)

(b) Check No. 021080, dated 11/13/98, \$93,439.02, issued by  
Washington Potato (ordinary course of business)

(c) Check No. 195360, dated 10/23/98, \$54,346.87, issued by  
Cenex Supply & Marketing (ordinary course of business;  
waiver)

(d) Check No. 02031, dated 11/17/98, \$91,417.25, issued by  
Basic American/Sunspiced (ordinary course of business;  
waiver)

(e) Check No. 1922261, dated 11/20/98, \$25,493.54, issued by  
Cenex Harvest States (ordinary course of business; waiver)

(f) Check No. 2610, dated 12/05/98, \$336,401.06, issued by  
Columbia River Sugar Co. (ordinary course of business;  
waiver)

(g) Check No. 2611, dated 12/05/98, \$50,695.65, issued by  
Columbia River Sugar (ordinary course of business; waiver)

(h) Check No. 7944, dated 12/29/98, \$88,903, issued by  
Maizena, Inc. (waiver)

(i) Check No. 02362, dated 01/14/99, \$26,034.83, issued by  
Basic American/Sunspiced (waiver)

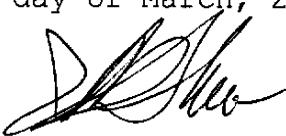
(j) Check No. 002541, dated 02/12/99, \$94,999.66, issued by  
Basic American/Sunspiced.

**IT IS HEREBY ORDERED** that the Findings and Fact and Conclusions of  
Law entered by the Bankruptcy Court for the Eastern District of  
Washington, are **AFFIRMED IN PART AND REVERSED IN PART**. U.S. Bank's  
appeal is **REMANDED** to the Bankruptcy Court for immediate implementation  
of this Order.

The District Court Executive is directed to enter this Order,  
provide copies to all counsel, provide a certified copy of this Order to  
the Clerk of the United States Bankruptcy Court for the Eastern District  
of Washington, Case No. 00-06907-R51 before the Honorable John A.  
Rossmeissl, deny all pending motions as moot, and close the file.

IT IS SO ORDERED. The District Court Executive is hereby directed  
to enter this Order and to furnish copies to all counsel.

DATED this 22<sup>d</sup> day of March, 2004.

  
\_\_\_\_\_  
EDWARD F. SHEA  
United States District Judge

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